(18)

NORFOLK SOUTHERN CORPORATION
THREE COMMERCIAL PLACE
NORFOLK, VA 23510-2191

James R. Paschall
General Attorney

Direct Dial Number:
(757) 629-2759
fax (757) 533-4872

December 9, 2002

Surface Transportation Board
Case Control Unit
1925 K Street, N.W.
Washington, DC 20423

Attention: Mr. Troy Brady

Re: STB Docket No. AB-167 (Sub-No. 1095X), Consolidated Rail Corporation - Abandonment Exemption - In Lancaster and Chester Counties, PA

Dear Mr. Brady:

In accordance with the Board's notice served October 24, 2002, in the above matter, please find the original and two copies of the Comments of Norfolk Southern Railway Company, Lessee and Operator of Pennsylvania Lines, LLC, Successor to Consolidated Rail Corporation, in Response to the Board's Request for Comments on the Reopened Historic Preservation Process under Section 106 of the National Historic Preservation Act in the subject proceeding.

Very truly yours,

James R. Paschall

cc(by mail, w/enc.): Joyce A. Nettke, Esq., FAST
Kurt W. Carr, PA Historical and Museum Comm'n
Advisory Council on Historic Preservation

Operating Subsidiary: Norfolk Southern Railway Company

BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC 20423-0001

STB Docket No. AB-167 (Sub-No. 1095X)

CONSOLIDATED RAIL CORPORATION
- ABANDONMENT EXEMPTION -
IN LANCASTER AND CHESTER COUNTIES, PA

COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY, LESSEE AND OPERATOR OF PENNSYLVANIA LINES, LLC, SUCCESSOR TO CONSOLIDATED RAIL CORPORATION, IN RESPONSE TO THE BOARD'S REQUEST FOR COMMENTS ON THE REOPENED HISTORIC PRESERVATION PROCESS

James R. Paschall
General Attorney
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510
(757) 629-2759

Attorney for:
Norfolk Southern Railway Company,
Lessee and Operator of
Pennsylvania Lines LLC,
Successor to Consolidated Rail
Corporation

December 9, 2002

TABLE OF CONTENTS

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-167 (Sub-No. 1095X)

Consolidated Rail Corporation
- Abandonment Exemption -
In Lancaster and Chester Counties, PA

Comments of Norfolk Southern Railway Company,
Lessee and Operator of Pennsylvania Lines, LLC,
Successor to Consolidated Rail Corporation,
in Response to the Board's Request for Comments on
the Reopened Historic Preservation Process

I. Identification of Party, Commenter.

Following are the comments of Norfolk Southern Railway Company ("NSR"), lessee of the property of, and operator of, Pennsylvania Lines, LLC ("PRR"),[1] a

---

[1]Norfolk Southern Corporation ("NSC"), a non-carrier holding company and parent to NSR, entered into a Transaction Agreement (the "Conrail Transaction Agreement") among NSC; NSR; CSX Corporation ("CSX"); CSX Transportation, Inc. ("CSXT"), a wholly-owned subsidiary of CSX; Conrail Inc. ("CRR"); Conrail, a wholly-owned subsidiary of CRR; and CRR Holdings LLC, dated June 10, 1997, pursuant to which CSX and NSC indirectly acquired all the outstanding capital stock of CRR. The Conrail Transaction Agreement was approved by the Board in a decision served July 23, 1998 in STB Finance Docket No. 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation.* The transaction was closed and became effective June 1, 1999. Pursuant to the Conrail Transaction Agreement, certain Conrail assets, including Conrail's interest in the "Enola Branch," were allocated to Pennsylvania Lines, LLC, ("PRR"), a wholly-owned subsidiary of Conrail. In a further action under the Conrail Transaction Agreement, PRR's assets, in turn, were leased to and are operated by NSR under the terms of an allocated assets operating agreement between PRR and NSR (the "NSR Operating Agreement"). Other Conrail assets were allocated to New York Central Lines, LLC, which is leased to and operated by CSXT. The remaining Conrail assets, principally

subsidiary of and successor to certain assets of Consolidated Rail Corporation ("Conrail"), in response to the Surface Transportation Board's ("STB" or "Board") notice served October 24, 2002 in the subject proceeding. The "Enola Branch," the railroad line that is the subject of this abandonment exemption proceeding, is among the Conrail assets that were allocated to PRR as of June 1, 1999.

II. Location of the Line To Be Abandoned.

The 66.5-mile former Conrail line of railroad known as the Enola Branch (or Low Grade Line) that is the subject of this abandonment proceeding is identified in the ICC's original decision in this proceeding, served February 22, 1990. The ICC identified the line as located between the clearance point of the switch to Green Giant in Parkersburg, PA, near milepost 1.1, and its connection to the Port Road Branch at CP "Port" in Manor Township, near milepost 33.7 (approximately 32.6 miles) and between its connection to Amtrak at CP "Park" in Parkersburg, near milepost 0.0, and its connection to the Port Road Branch at CP "Port" in Manor Township, near milepost 33.9 (approximately 33.9 miles).[2]

---

including operating properties in the Detroit, Northern New Jersey and Southern New Jersey/Philadelphia areas, were retained by Conrail and are operated by Conrail as "Shared Asset Areas." Pursuant to comprehensive agreements, Conrail continues to operate the railroad properties in these areas for the joint benefit of NSR and CSXT in serving their customers in the areas.

[2]The main focus of the historic preservation process in this matter has been on the portion of the line of railroad that has long been known as the Enola Branch. This line segment extends across Lancaster County, PA, from approximately milepost 27 (1 mile east of Safe Harbor, at the confluence of Conestoga Creek with the Susquehanna River) easterly to the Chester County, PA, line at milepost 4.03. A short portion of the Enola Branch (between mileposts 4.03 and 0.0) lies in Chester County. The Enola Branch passes though the Townships of West Sadsbury, Sadsbury, Bart, Eden,

III. Prior Proceedings.

Conrail filed the Notice of Exemption in this matter on October 3, 1989. The significant prior proceedings, and the key facts leading up to the draft Memorandum of Agreement are recounted in, and the draft MOA is attached to the Board's decision served August 13, 1999. The proceedings thereafter, including the Court of Appeals decision thereafter are summarized in the Board's request for comments served October 24, 2002. The most important additional matter of note are the letters of April 27, 1998 and June 18, 1998 from the Pennsylvania SHPO to Conrail's attorney, David C. Eaton, expressing agreement that the mitigation measures in the MOA were acceptable in mitigation of the adverse effects that abandonment of the line would cause to historic properties. These are appended as Attachments 1 and 2. NSR will provide a more comprehensive list of the prior proceedings and pertinent documents if the reference to the prior decisions of the Board in which most of them are contained is insufficient.

There are two principal facts in this proceeding at this stage. The first is the continued abusive manipulation of the Section 106 process by a small group of individuals known as Friends of the Atglen-Susquehanna Trail (FAST), who wish to

---

Providence, Martic and Conestoga, and the Borough of Quarryville. The other portion of the entire 66.5-mile line to be abandoned was at one time called the Quarryville line. All or part of either or both segments were also referred to in the past as the Atglen & Susquehanna Branch. Since the two line segments eventually were operated together, they apparently often became referred to as the Enola Branch. The lack of traffic on the line and losses sustained in the operation, maintenance and continued retention of the combined line justified abandonment of the entire 66.5-mile line segment as a whole. When Conrail filed its abandonment notice on October 3, 1989, it could assert that there had been no local traffic on the line for at least two years and thus qualified for the class

have the Board confiscate the railroad's private property for their use as a trail without regard to their lack of resources to maintain the property and assume liability for it, disregard Conrail's settlement agreement with the townships which will transfer most of the property to them and pay them a considerable sum of money and continue to leave bridges in place without regard to their designation for removal for safety reasons by the Pennsylvania PUC and the injuries and at least one death that have been occasioned by auto accidents which occurred when people ran into the bridges which are around sharp curves and restrict the clearance of the roadway. The other fact is that an examination of the statute and case law shows that the Section 106 process is not applicable to STB abandonment proceedings because neither the proceedings nor the railroad's post-abandonment activities with respect to the property are Federal undertakings. Since this fact is jurisdictional, it can be raised at any time and the proceeding discontinued.

IV. Court of Appeals Decision Remanding Case for Further Section 106 Process Review.

In the October 24, 2002 notice, the Board requested comments on certain issues pertaining to the reopened historic preservation review process ("Section 106 process")[3] in this rail line abandonment exemption proceeding. The Section 106 process in this case has been reopened in accordance with the decision of the United States Court of Appeals for the Third Circuit in *Friends of the Atglen-Susquehanna Trail, Inc.* v. *Surface*

---

exemption for abandonment of out of service rail lines.

[3] Federal agencies are required to comply with the historic preservation process under Section 106 of the National Historic Preservation Act ("NHPA") before taking final

Transportation Bd., 252 F.3d 246 (3d Cir. 2001) ("*FAST Decision*"), which remanded the case to the Board for further handling under the Section 106 process solely on procedural grounds.

The Court of Appeals based the decision on the conclusion that the Board did not give the Advisory Council on Historic Preservation ("ACHP") adequate notice and opportunity to comment on the potential adverse effect of the abandonment on historic properties, did not identify potentially interested parties to consult on the Section 106 process, and did not inform the ACHP as to how it identified eligible property. The decision was not based on any substantive grounds. The Court only required the Board to "touch all the bases" and give consideration to the SHPO's and ACHP's opinions and comments before reaching a final decision.[4] The question of whether the Section 106 process is or should be applicable to STB railroad abandonment proceedings was not raised.

V. General Comments.

The Board is well aware that the purpose of the appeal and the further proceedings that have resulted from it only incidentally concern proper procedures under the historic preservation process and satisfactory mitigation of any adverse effects of the abandonment of the Enola Branch upon historic properties. That could

---

action in many types of proceedings.

[4]Whether the Court's decision and the factual interpretations and conclusions on which it is based are correct may be debatable. Nonetheless, the decision is the law of the case. It would be unproductive to take issue with the Court's premises or conclusion insofar as it requires further proceedings in this case. Our comments are made within that framework.

have been done years ago without litigation or controversy. Nonetheless, compliance with the Court's decision is required, and the Board has already proceeded to complete the procedures and requirements of the Court's remand decision. Once that is accomplished this proceeding may finally be concluded and the abandonment of the line and disposition of the property mainly in accordance with agreements with various state and local governments can finally take place.

The stated objective of the appellant in the court appeal, a small group of recreational trail fans calling themselves Friends of the Atglen-Susquehanna Trail, Inc. (FAST) is to force the Board to require the railroad to donate the right-of-way and remaining structures to them for use as a recreational trail. The Board recognized this at footnote 18, sheet 9 of the slip opinion of the Board's decision served August 13, 1999 in this matter.

The Board's attempt to conclude this proceeding on a reasonable basis has been stymied by FAST's campaign to force Conrail to donate the property to it for trail use. The continuation of this proceeding and its attendant costs to the Board, the railroad and the public, is wasteful, futile and even tragic considering the loss of life caused by an automobile striking a bridge that would have been removed but for the continued inability of the railroad to remove it because of the stay imposed in connection with the requirement that the Section 106 process be completed.

VI. The Board Should Discontinue Application of The Section 106 Process To Rail Line Abandonment Proceedings Since It Is Not Applicable to Such Proceedings Under the National Historic Preservation Act.

A. Introduction.

In view of the experience of the ICC and the STB with the increasing delays and abuses caused by application of the Section 106 process under the National Historic Preservation Act (NHPA) to STB railroad abandonment proceedings and in consideration of the growing body of law concerning the limited scope of the actions to which the NHPA applies, this is an appropriate case in which to raise the jurisdictional question of whether the Section 106 process is applicable to STB railroad abandonment proceedings at all. In NSR's view, it has become clear that the Section 106 process is not legally required in STB railroad abandonment cases and its application in such cases before the Board should be discontinued by the Board.

Few historic preservation issues have gone to the Courts of Appeals in petitions for review of STB railroad abandonment decisions. We have found no Federal Court case in which the question whether the Section 106 process actually applies to STB abandonment proceedings has been raised. Even this case did not present the issue to the Court of Appeals. In view of several, mostly recent court cases which hold that the Section 106 process does not apply in similar types of cases and indeed cases where its application might seem more appropriate, the Board should now find that Section 106 of NHPA does not apply to STB railroad abandonment proceedings because they are not "Federal undertakings" necessary to trigger Section 106's application.

The Section 106 process is the single greatest impediment to STB adherence to

Congressional policy expressed in the ICCTA and in the legislative history as to railroad abandonments and to efficient administration of the Board's statutory mandate under the ICCTA. This is not because of lack of co-operation by the railroads who provide historic reports (although they often have little information particular to a specific line segment), photographs of bridges and structures, and all the charts, diagrams, specifications and records in their possession - often to be told by some SHPOs that this is insufficient even for the identification of the historical nature of the property. Thus, even if the Board were to consider applying the Section 106 process voluntarily, it should not do so.

The Section 106 process goes on without time limitations, is truly Byzantine in its complexity and vagueness, and fraught with the possibility that endless backtracking in the process and additional comments will have to be considered. The Court's decision in this case will increase that possibility. This is especially ironic in view of the fact that delays in concluding these cases are mostly caused by SHPOs, the ACHP and other historic preservation interests themselves. The application of the Section 106 process truly has become an example of the tail wagging the dog, or worse. A solely procedural statute of limited application and supposedly no substantive requirements is nonetheless being abused before, and applied by, the Board with increasing costs and increasingly costly substantive requirements. It is being used to thwart the Congressional policies and mandates that rail line abandonment proceedings be handled promptly and that the railroads be able to simply remove their own private assets, without Federal funds or assistance, from an unprofitable part of the business

and devote them to fulfilling their common carrier obligations to the public in areas where they can be used more productively. This is the Board's mandate, and where we are sure it wishes to place its emphasis. This state of affairs is not the Board's doing nor its apparent desire, but the Board can now rectify it. As the decisional law pertaining to NHPA becomes increasingly clear, showing that the Board is not required to continue to tolerate these practices and abuses, it is time to end the unnecessary application of the Section 106 process to STB railroad abandonment proceedings. The Board can then to turn its attention to administering the ICCTA and the railroads can turn their attention to running their business in the broad public interest.

The entire public benefits from a sound, efficient, and cost-effective railroad system. *See* Steven R. Wild, *History of Railroad Abandonments*, 23 Transp. L.J. 1, 10 (Summer 1995), quoted *infra* at p. 45. Congress has recognized that the interest in historic preservation outside of public property, lands and projects being more narrow and of lower priority must be subordinated to greater substantive goals under other laws in the promotion of interstate commerce or the protection of private property. Private property must not be taken or used without compensation nor costs imposed on private parties undertaking private activities with their own property to serve historic preservation goals under NHPA. If it were otherwise, Congress would have extended the application of NHPA to private undertakings and private property, made it a substantive law and provided compensation to parties that were affected by the taking of their property. Moreover, there are other avenues for the government and even private parties to preserve or document property they believe is historic without

burdening private parties with the costs of doing so. For example, after a railroad has consummated abandonment of a rail line and no longer uses the property in railroad service (a possibility as to all or some of the property in some cases), any governmental entity with condemnation power can take the property in order to preserve it. Private parties interested in the preservation of the property once it has been removed from STB regulation and railroad service can negotiate to purchase it to preserve it or to gain access to it for the purpose of photographing or otherwise documenting it if they wish to do so at their own expense.

Requiring a railroad, a private business not engaged in a Federal undertaking or benefiting from such an undertaking, to incur costs of delay in exiting an unprofitable line or costs of preserving or documenting a property is contrary to the overriding mandate of Congress in the ICCTA and the public interest, as well as unreasonable, arbitrary and capricious and possibly even confiscatory. The revenue to cover the costs of delays and increasingly costly "mitigation" measures (mainly with respect to one bridge after another, no matter how many similar ones have been photographed and documented) must come from someone, and it is not coming from the Federal government. Instead, it is coming from the shipping public, the railroad rate-payers, or coming at the expense of fully maintaining railroad facilities and equipment at peak efficiency for the shipping public. To contend that it should come from the railroad's shareholders would be ridiculous when the railroads rarely have earned a return equal to their cost of capital. Moreover, historic preservation is not a cost of doing business or something from which the customers of the business benefit. Indeed, to impose

unnecessary costs of preserving arguably historic railroad facilities, that few people in fact want preserved in any fashion, on the railroads simply makes them less competitive with the motor carriers. In view of our crowded highways and need for fuel efficiency, that is not in the general public interest. Neither the ICCTA nor NHPA contemplate or require this.

This case exemplifies the extreme delays and costs, in this case as to human life as well as money, that are caused by abuse of the Board's procedures and proceedings through abuse of the Section 106 process by narrow, private interests seeking an outcome that the ICCTA, the National Trail System Act and indeed the NHPA itself do not directly permit. The impediments to accomplishment of the Congressional purposes to provide for speedy review of railroad abandonment proceedings and redeployment of the rail carrier's resources in its enterprise in the public interest, not to mention the delay in removal of bridges at which traffic accidents, including at least one fatal one, have occurred, is just more patently obvious in this case than in some others. Undue delays in completing Board proceedings and unwarranted and expensive requirements for railroads simply to exit money-losing aspects of their business and redeploy their own private property more productively are endemic because of the application of the Section 106 process in STB railroad abandonment proceedings. This case is merely one of the worst examples.

The Board should use this case to re-examine the applicability of the Section 106 process in STB railroad abandonment proceedings. It is NSR's view that the process is not legally required, and the Board should use this case to free both the Board and the

railroads from the costs and delays increasingly imposed on these proceedings not just by the increasing demands of historic preservation agencies, but by private individuals or groups seeking benefits at the railroad's, and the public's, expense through manipulation and abuse of the process.

This practice of abusing the Section 106 process is especially egregious in this case where a trail group (having enlisted the assistance of the ACHP) with the goal only incidentally of mitigating adverse effects on arguably historic property instead seeks to have the railroad's private property donated to them for a trail rather than conveyed to the townships as the railroad has agreed upon or as to some bridges, taken down to improve highway safety, and otherwise redeployed in the railroad's business of serving the public's need for transportation. No law directly allows this outcome. FAST has openly declared this as their goal, however. FAST obviously is attempting to accomplish this through making the cost to the railroad in delay and, if they can persuade the Board to impose them, additional "mitigation" conditions, too high to do anything other than give in to them in order to stop the revenue drain and end the matter. The local governments, presumably reflecting the views of most of their constituents, do not want this result. They in fact long ago reached an agreement for conveyance of most of the property to them, along with funds for some maintenance of property that they will actually retain, thereby in effect providing additional mitigation of the effect of the abandonment on the property. Senator Specter, Congressman Pitts and others support the townships. The Pennsylvania Public Service Commission does not want the result sought by FAST because that commission has determined that

certain bridges should be removed to improve highway safety. Many members of the public have supported this objective. The railroad does not want the result sought by FAST because after Conrail spent a considerable amount of time negotiating with FAST, it could reach no reasonable agreement with them and now has agreements with the townships that it is committed to carry out and does not see the purpose of continued revenue loss on this matter. Congressional policy does not support the drain on railroad revenues for this purpose. Yet the Section 106 process permits FAST to drag out a proceeding for a benefit to a small group of people, principally themselves, at the expense of the railroad and the public that the Board cannot directly grant to FAST. This is inconsistent with the law which the Board is charged to administer, so presumably the Board does not wish this result either. These types of situations are not required by law and are completely unnecessary. They should end with this case.

B. The Inapplicability of the National Historic Preservation Act (NHPA) to STB Railroad Abandonment Proceedings is a Jurisdictional Argument That Can Be Raised at Any Time.

Subject matter jurisdiction may be raised at any time in any proceeding. This fundamental principle has been repeated by the U. S. Supreme Court in cases spanning the centuries from *Capron* v. *Van Noorden*, 6 U.S. 126, 2 L. Ed. 229 (1804) through *Ex Parte McCardle*, 74 U.S. 506, 19 L. Ed. 264 (1869) and *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884) to recent cases such as *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003; 140 L. Ed. 2d 210 (1998). Of course, the Board has also recognized this principle. *See* STB Docket No. AB-55 (Sub-No. 562X), *CSX Transportation, Inc. – Abandonment Exemption – in Rocky*

Mount, Nash County, NC (served July 27, 2000), where the Board stated at page 4 of the slip opinion: "Furthermore, it is well established that subject matter jurisdiction may be raised at any time. See, e.g., *Consolidated Papers, Inc.* v. *CNW Transportation Co.*, 7 I.C.C.2d 330, 332 (1991)."

C. Application of the Section 106 Process To Federal Agency Action Requires That The Program, Activity or Project Resulting from That Action Be A Federal Undertaking.

a. NHPA Applies Only To A Federal Undertaking.

The Section 106 process under the NHPA is applicable only to a Federal, Federally-assisted or Federally-licensed undertaking. Section 106, codified at 16 U.S.C. § 470f, reads as follows:

> § 470f. Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation
>
> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or Federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter [16 USC §§ 470i et seq.] a reasonable opportunity to comment with regard to such undertaking.

Significantly, the Federal undertaking must be one that is funded in whole or in part by Federal funds. The definition of "undertaking" in 16 U.S.C. § 470w(7) was last amended in 1992 amendments to read:

> (7) "Undertaking" means a project, activity, or program funded in whole or in part

under the direct or indirect jurisdiction of a Federal agency, including—

(A) those carried out by or on behalf of the agency;

(B) those carried out with Federal financial assistance;

(C) those requiring a Federal permit, license, or approval; and

(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

STB authorization or exemption from regulation of railroad line abandonments does not constitute a Federal undertaking because any project or activity resulting from the abandonment authority or exemption (1) is not carried out by or on behalf of the agency, (2) is not carried out with Federal funds or any sort of Federal assistance, (3) is not the subject or purpose or even a necessary consequence of the Federal license or approval, (4) is not subject to State or local regulation under delegation or approval of the STB, and (5) will not necessarily or usually result in any contract under which the railroad will receive Federal funds, or, indeed, any income-producing license or franchise. The STB has no jurisdiction or oversight of post-abandonment use of property formerly constituting a line of railroad. *Preseault* v. *ICC*, 494 U.S. 1, 5 n.3 (1990); *Hayfield N. R. R.* v. *Chicago & N. W. Transp. Co.*, 467 U.S. 622, 633 (1984); *RLTD Railway Corp.* v. *STB*, 166 F.3d 808 (6th Cir. 1999); *Wisconsin Cent. Ltd.* v. *Surface Transp. Bd.*, 112 F.3d 881 (7th Cir. 1997); *Conrail* v. *Surface Transp. Bd.*, 93 F.3d 793 (D. C. Cir. 1996); *Fritsch* v. *Interstate Commerce Commn.*, 59 F.3d 248 (D.C. Cir. 1995). *See also Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981).

b. The STB Has No Role In The Railroad's Post-Abandonment Activities With Respect to the Property That Was Formerly A Line of Railroad.

After the STB authorizes an abandonment, which is simply the permission to permanently cease rail service over the line, or more likely applies the exemption criteria ministerially to exempt a railroad from regulation with respect to an abandonment, and the railroad consummates the abandonment and removes the property from rail service, the Board's jurisdiction is exhausted as the citations immediately above show. The Board has no role in, control over or licensing authority with respect to what happens to the property thereafter. The Federal government will neither provide financial aid to the railroad's subsequent activity nor will the Federal government receive any revenue from it.

The railroad's private action that may take place with respect to the property that formerly was a rail line after consummation of its abandonment, is in no way converted to a Federal action or an undertaking either financially assisted or licensed by any Federal action thereafter inasmuch as no Federal action is required or contemplated.

The railroad will not enter into any sort of "partnership" or "joint venture" with the Federal government, for example by contracting with the STB or any other Federal agency to obtain goods, services, or financing for the use and disposition of the property after the abandonment of a rail line is consummated. In fact, the post-abandonment use of the property constituting the rail line is not taken into account or approved by the Board as part of the decision or exemption with respect to abandonment of the rail line, as we discuss in slightly more detail below. The property may be preserved intact or

mostly intact almost indefinitely either through the railroad's retention of the property or through its conveyance to a party (including a government entity), who may preserve it largely or entirely in its current form or use it for another public purpose. It may be altered or demolished or used for an entirely different private purpose.

Regardless of what happens to the railroad property that was a former rail line after the railroad consummates its abandonment, the Board has no authority to approve or disapprove its use or disposition nor to regulate it or any activity upon in it in any manner thereafter. The Section 106 process should not be applied to proceedings that merely allow a private business to deal with its property as any other property owner would do or to undertake activities with respect to it that are not funded, approved or undertaken by the Federal government.

c. The Line of Railroad is Private, Not Public, Property Following Consummation of a Rail Line Abandonment.

The Board is well aware that even though it is subject to regulation, railroad property constituting a rail line is private property both before and after the line's abandonment has been authorized or exempted and is exercised or consummated by the railroad. The land and structures remaining after the property is no longer a regulated line of railroad will be owned by private parties, either the railroad or reversionary property owners, not the Federal government, unless it condemns them. Thus, even if the determination that the railroad's post-abandonment use of or activity with respect to its own private property was a Federal undertaking could be predicated on the basis of that property being Federal property, such a determination cannot be

made. The property that is the subject of STB rail line abandonment proceedings is private, not Federal, property and remains so after the abandonment.

D. STB Authorization or Exemption of Railroad Abandonments Is Not a Federal Undertaking Under the NHPA Because No Federal Funds Are Expended on A Project, Program or Activity After or As A Result of the Issuance of STB Abandonment Authority or Exemption.

a. Requirement for Expenditure of Federal Funds on a Program, Project or Activity for Federal Action to Be an Undertaking Under NHPA.

The definition of a Federal undertaking in 16 U.S.C. § 470w(7) clearly requires that Federal funds be expended in whole or in part on a project, activity or program in order for the program to be considered a Federal undertaking subject to the Section 106 process under NHPA. As the United States District Court for the Northern District of New York has recognized in *Western Mohegan Tribe & Nation* v. *New York*, 100 F. Supp. 2d 122 (N.D.N.Y. 2001), *partially vacated and remanded on other grounds*, 246 F.3d 230 (2d Cir. 2001):

> "In order for a project to be 'Federally assisted' within the meaning of NHPA . . . it must be wholly or partially funded with Federal money. It is this money which imparts a Federal character to a project and gives rise to the necessity of meeting the statutory requirements of those two acts. Without such federal funds, the project remains local in nature." *O'Brien v. Brinegar*, 379 F. Supp. 289, 290 (D. Minn. 1974).

We might add that in this case, the project is not merely local, but private, in nature. *See also Ringsred* v. *Duluth*, 828 F.2d 1305 (8th Cir. 1987); *Save the Bay, Inc.* v. *United States Corps of Eng'rs*, 610 F.2d 322, 326-27 (5th Cir.), *cert. denied*, 449 U.S. 900, 101 S. Ct. 269, 66 L. Ed. 2d. 130 (1980).

In *South Bronx Coalition for Clean Air* v. *Conroy*, 20 F. Supp. 2d 565 (S.D.N.Y.

1998), the Metropolitan Transit Authority of the State of New York ("MTA") sold a Federally funded bus depot and used the proceeds to purchase a new facility. Plaintiff sought to enjoin the sale of the bus depot, asserting NEPA violations. The court dismissed the complaint, concluding that the FTA's role was limited to (1) providing funds for the purchase and construction of the depot and (2) concurring in MTA's proposal to apply proceeds of the sale toward a new facility. Because the FTA had no control over the MTA's project decisions, "major Federal action" did not exist and the NEPA statutes did not apply. NHPA has on many occasions been interpreted as having the same limitations on its scope as NEPA. Clearly, the Board also exercises no control over the railroad's decisions with respect to property that was once a line of railroad.

In *Woodham* v. *Federal Transit Admin.*, 125 F. Supp. 2d 1106 (N.D. Ga. 2000), the court found that a joint development plan with private parties using part of property owned by the Metropolitan Atlanta Rapid Transit Authority ("MARTA") in Atlanta and purchased with Federal funds in connection with the development of the Lindbergh MARTA station, as proposed by MARTA and concurred in by the FTA, was not a "Federal undertaking." Thus, the Section 106 process did not apply. While the FTA provided MARTA with Federal grants to purchase property around the Lindbergh station where the joint development would take place, the project was funded by private investors and MARTA. Even if a portion of the Federal funds had been used to develop the project, the Court found that NHPA had not been violated because the FTA had no supervision or control over the spending of these funds, citing *Maxwell Street Historic District Preservation Coalition* v. *Bd. of Trustees of the University of Illinois*, 2000 U.S.

Dist. LEXIS 11750, No. 00-C-4779, 2000 WL 1141439, *2 (N.D. Ill. August 11, 2000) at *4. The Board has no supervision or control over the spending of the railroad's **private** funds in dealing with property after abandonment authority has been approved or an exemption becomes effective, much less does it disburse Federal funds or supervise or control Federal funds with respect to activities following the consummation date of a railroad abandonment.

The District of Columbia Circuit's decision in *Sheridan Kalorama Hist. Ass'n v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995) does not, in our view, preclude a determination that an "undertaking" must involve, in some respect, federal funding. Although the court in that case stated that it "infer[red] that Congress intended in 1992 to expand the definition of "undertaking" to include projects "requiring a federal 'permit' or merely federal 'approval,'" 49 F.3d at 755, that statement is *dicta*, as the court itself noted. *See id.* (acknowledging that the court "need not decide" whether the project at issue was an "undertaking"). Rather, the determinative issue in that case was whether the project at issue, whether an "undertaking" or not, was "federally licensed" by virtue of the government's failure to *disapprove* it – a question not at issue here – and the court held that it was not. *See id.* at 757. In any event, we respectfully submit that the court's apparent view that an "undertaking" need not involve, in some respect, federal funding, is at odds with the plain language of the statute and with the later court decisions cited above.

b. No Federal Funds are Used for Any Project or Activity on Railroad Property Following Its Abandonment As A Line of Railroad As a Result of the STB's Abandonment Decision or Exemption.

While the Board's power to grant the abandonment authority might be considered greater than the more ministerial actions of the FTA in *Woodham*, in fact, exemptions must be created if the statutory and regulatory criteria are met, and the Board's action in exemption proceedings is little more than ministerial, especially in proceedings with respect to notices of exemption. Even with respect to abandonment applications, the Board must nonetheless grant the abandonment authority if the public convenience and necessity standard is met. In notice of exemption cases, the Board does little more than ministerially apply the criteria for exemption. While the Board's actions in petition for exemption cases are a little more complex, once the Board establishes that the railroad has met the criteria for an exemption from regulation, the Board exempts the abandonment of the subject line from regulation. Thus, the Board acts ministerially in notice of exemption cases, and very close to ministerially in petition for exemption cases. The Board does not have unfettered discretion in permitting railroads to cease providing unprofitable rail service over a line of railroad even in abandonment application cases.

While we might not rule out that property that was once a rail line could ultimately be used for a Federal undertaking, that would not directly result from the Board's actions in the abandonment exemption or application cases. If NHPA applies in connection with the later Federal undertaking, the involved Federal agency should

consider NHPA's application to that undertaking. The STB should not apply the NHPA process to hold up the entire abandonment because another Federal agency may undertake some action with respect to part (most likely) or all of the property or worse, upon the possible alternatives open to the railroad or another Federal agency in dealing with the property once STB jurisdiction as to it ceases, as we note in more detail below.

No Federal funds are used to consummate a railroad line abandonment, nor does STB abandonment authority or exemption result in the use of Federal funds for any project or activity on the railroad property after the abandonment authority or exemption is exercised. For this reason, STB rail line abandonment exemption and application proceedings, as well as post-abandonment use of the property that was a rail line, are not within the definition of a Federal undertaking and the Section 106 process should not be applied to them.

E. STB Authorization or Exemption of Railroad Abandonments Is Not a Federal Undertaking Under the NHPA Because The STB's Action Is Not A License or Permit for A Program, Project or Activity Using the Property of the Former Rail Line After The Board's Decision or Exemption Becomes Effective and the Board Loses Jurisdiction Over the Property.

a. The STB's Decision in an Abandonment Proceeding Is Based on the Public Convenience and Necessity Standard of the ICCTA. The STB Examines Whether Railroad Property Must Continue to Be Used As A Line of Railroad, Not Its Potential Future Use After Its Abandonment as A Line of Railroad.

The ICC and the Board have often referred to the statutory standard governing permission or an exemption for the purpose of abandoning a line of railroad: whether the present or future public convenience and necessity (PC&N) require or permit the

proposed abandonment. 49 U.S.C. 10903(e). In implementing this standard, the Board balances the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce. The Board cannot, and will not, allow the statutory standards to be misinterpreted by the consideration of some other "entire public interest" factor or some other claimed public interest factor that arguably may benefit a segment of the public. *See* STB Docket No. AB-33 (Sub-No. 183), *Salt Lake City Corporation - Adverse Abandonment - in Salt Lake City, UT*, served March 8, 2002.

The Board has no authority under the ICCTA to consider the future use of the property after it ceases to be a line of railroad as a consideration in determining whether the Board should permit a line of railroad to be abandoned or grant an exemption that would permit a rail line abandonment. *Black* v. *ICC*, 737 F.2d 643, 652 (7th Cir. 1984) We have found no claim to the contrary by the ICC nor the Board since *Black*.

b. No Federal Undertaking Occurs In an STB Abandonment Exemption Proceeding, Which Merely Results in the Withdrawal of Regulation Under the ICCTA as to Certain Property As a Line of Railroad Pursuant to a Ministerial Application of the Exemption Criteria to the Notice or Petition.

It is especially ironic that exemption proceedings, such as this one, which were designed to permit railroads to abandon rail lines quickly by removing the railroad's action from STB jurisdiction and involve mere ministerial application of established statutory and regulatory criteria to abandonments that fit within those criteria, are subject to incredible delays simply due to the Section 106 process. A notice or decision on a petition exempting a railroad from complying with the regulatory requirements of

Title 49 of the U. S. Code, and in particular 49 U.S.C. 10903, is quite the opposite of a Federal undertaking that licenses or approves an a (Federally funded) project, program or activity.

The STB has the authority to exempt the abandonment of a railroad line from regulation. In an abandonment exemption proceeding, not only does the Board not license a program, project or activity that may take place on the railroad property after the abandonment is consummated, the Board does not even apply a substantive review under the ICCTA to the notice or petition because it is presumed that the railroad's action should be exempt from regulation if the proper criteria are met as to the line. The Board simply applies the exemption criteria set out in the ICCTA and the Board's regulations and the exemption becomes effective. The railroad can then abandon the line without further review under the ICCTA. Surely these exemptions therefore cannot rise to the level of a Federal undertaking where the purely procedural provisions of the NHPA apply. Of course, when they are applied, they are often now applied with the effect of delaying the proceeding and adding substantial costs to the railroad's effort to exit an unprofitable part of its business and recover a portion of its private capital that was invested in the business.

The abandonment provisions and policies of ICCTA, and revisions to the Interstate Commerce Act in the 4R Act and Staggers Act before it, much less the provisions allowing exemption from the Acts' substantive provisions that these laws provided for, were enacted with the express purpose of preventing such delays and costs.

c. The Legal Effect of Either A Grant of STB Abandonment Authority or an Exemption From STB Regulation Is Merely To Allow Permanent Cessation of Rail Service Over a Property and to Withdraw STB Jurisdiction Over That Property, Not to Determine Its Future Use.

In *Hayfield Northern Railroad Co., Inc.* v. *Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984), the U.S. Supreme Court stated at 467 U.S. 633-634:

> The proposition that, as a general matter, issuing a certificate of abandonment terminates the Commission's jurisdiction is strongly buttressed by the Commission's own interpretation of its regulatory authority. According to the Commission, "the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction. Questions of title to, and disposition of, the property are the matters subject to State law." Abandonment of Railroad Lines and Discontinuance of Service, 365 I. C. C. 249, 261 (1981); see also Chicago & N. W. Transportation Co. -- Abandonment -- in Waukesha, Jefferson and Dane Counties, WI, I. C. C. Docket No. AB-1 (Sub-No. 144) (May 5, 1983) (set forth in App. to Joint Supplemental Memorandum of Appellant and Appellant-Intervenor A-1, A-5); Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions, 363 I. C. C. 132, 135 (1980) ("When a rail line has been fully abandoned, it is no longer [a] rail line and the transfer of the line is not subject to our jurisdiction" (footnote omitted)), aff'd sub nom. Simmons v. ICC, 225 U. S. App. D. C. 84, 697 F.2d 326 (1982); Modern Handcraft, Inc. -- Abandonment in Jackson County, Mo., 363 I. C. C. 969, 972 (1981).

In ICC Docket No. AB-33 (Sub-No. 78), *Union Pacific Railroad Company – Abandonment -- In Saline, Ottawa, Lincoln, Russell, Osborne and Rooks Counties, KS,* (served January 19, 1994), the ICC stated at pages 7-8 of the slip opinion:

> The matters of bridges, cleanup, and land restoration are properly resolved under State law. Our conditioning authority is used to ensure that the anticipated impacts of the abandonment do not exacerbate [*8] an already existing problem. Union Pacific R.R. Co. -- Aban -- Wallace Branch, ID, 9 I.C.C.2d 325, 335 (1992) (Wallace Branch). The function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the

> unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. After a line is abandoned pursuant to our authority, our jurisdiction ends and State and Federal property law control. Id., citing Hayfield Northern R.R. Co. v. Chicago & N.W. Transp. Co., 467 U.S. 622 (1984).

In ICC Docket No. AB-290 (Sub-No. 123X), *Norfolk Southern Railway Company – Abandonment Exemption – Between Red Bay and Haleyville, AL in Franklin, Marion and Winston Counties, AL – In the Matter of a Request to Set Terms and Conditions*, (served October 8, 1993), the ICC stated:

> We disagree with Sunshine's assertion that NS must remove the bridges on the line. None of the bridges crosses a navigable waterway, Alabama State law does not require removal of the bridges, and NS states that it is under no contractual obligation to remove any of the bridges....Removal of these bridges is a matter within the managerial discretion of the railroad.

In STB Docket No. AB-246 (Sub-No. 2X), *Yreka Western Railroad Company – Abandonment Exemption – In Siskiyou County, CA*, served May 4, 1999, the Board stated at page 12 of the slip opinion: "SEA [the Board's Section of Environmental Analysis] notes that Board decisions in abandonment cases, if favorable, are permissive only, and that the actual abandonment and disposition of physical assets take place at the discretion of the railroad."

The legal effect of STB abandonment authority, or an exemption from regulation, is simply to permit, but not require, a railroad to be remove as a line of railroad from its use as such a rail line under the STB's regulatory jurisdiction. The property may continue to be used in railroad service as industrial track, an unregulated tourist train operation, a commuter rail operation or as a private track. It may serve another function in the railroad's business. It may be conveyed to a government entity for a wide variety

of public uses, such as road construction. It may revert to, or be sold to, adjoining landowners. Regardless of what use will be made of the property after it is no longer a line of railroad, the STB will not have licensed or approved that use.

Moreover, the Board will not retain jurisdiction or oversight over the property as a railroad line as to which the STB's permission is required for any future railroad action or use with respect to it, except restoration of regulated rail service. The Board has no continuing jurisdiction over the property that was once a rail line or over any project, activity or program that takes place upon it, including its alteration or demolition, following consummation of an abandonment. For example, if abandonment of a rail line is consummated and the property is not otherwise still used for railroad purposes, the intact property could be condemned by a state or local government, which would have no obligation to seek the Board's permission to acquire the property, to alter or demolish the property or any structure on it or to use it for any purpose except regulated rail service.

The railroad's action in seeking STB approval or exemption for a railroad abandonment is merely compliance with regulations required in order to use its private property more productively. A private party's compliance with regulations in the conduct of its private business with its own funds does not make such compliance or the agency proceeding that reflects such compliance a Federal undertaking that licenses or approves any action that is taken either with Federal funds or continuing Federal oversight.

d. The Railroad Does Not Secure Any Income from a Federal Contract or Receive an Income-Producing License or Franchise As a Result of An STB Railroad Abandonment Exemption or Decision.

An STB abandonment decision or exemption does not result in a railroad receiving any income from a Federal contract after the decision or exemption becomes effective. Indeed, an abandonment decision or exemption does not result in a railroad receiving any income-producing license or franchise of any sort. Under these circumstances, it is clear not only that a railroad does not receive Federal funds either directly or indirectly as a result of the abandonment decision or exemption, but that the decision does not result in the railroad securing any license or franchise from which it can secure any production of income from Federal contracts or from any source at all. Thus, an STB railroad abandonment decision or exemption proceeding does not constitute or result in a Federal undertaking under NHPA.

e. STB Abandonment Authority Is Not A License or Permit; It Merely Changes The Status of the Property With Respect to STB Jurisdiction.

The disposition, use, alteration or demolition of railroad property following an abandonment of a rail line does not directly result from the Board's decision or exemption in the abandonment proceeding. Even though it might be argued that but for the abandonment authority or exemption, the railroad would not be able to deal with, alter or dispose of its property in the same manner that any other (unregulated) landowner or business could do, the subsequent use of the property is not sanctioned by, nor does not it inevitably or directly result from, the Board's action. In many cases,

the subsequent use of the rail line will not even be known on the consummation date of the abandonment, much less on the date the notice of or petition for exemption, or application, is filed. Upon consummation of the abandonment, the property will have indeed become just like any other unregulated property. *See Landmark West!* v. *United States Postal Serv.*, 840 F. Supp. 994 (S.D.N.Y. 1993), aff'd 41 F.3d 1500 (2d Cir. 1994).

It is thus clear that STB abandonment authority or exemption only permits a change in the status of property with respect to STB jurisdiction. It is not a license or permit to do anything other than to cease devoting the property to providing rail service. Thus, an STB abandonment proceeding cannot be considered a Federal undertaking as a licensing proceeding even if there were no requirement that a licensing proceeding under NHPA involve the expenditure of Federal funds to be a Federal undertaking.

F. STB Authorization or Exemption of Railroad Abandonments Is Not a Federal Undertaking Under the NHPA Because the STB Has No Oversight or Jurisdiction Over Post-Abandonment Use of Property That Was Under Its Jurisdiction As a Line of Railroad.

a. An STB Decision or Finding Permitting A Railroad Abandonment Ends the Railroad Property's Status As a Line of Railroad and Subjects the Property to the Processes of State Law.

The effect of STB authority or exemption permitting abandonment of a railroad line ends the railroad property's status as a line of railroad and subjects the property to the processes of state law, including the possibility of condemnation if legally applicable. Anything done with the property after the abandonment is consummated is both local

and private in nature. *Hayfield N. R. R.* v. *Chicago & N. W. Transp. Co.*, 467 U.S. 622, 633 (1984); *Kansas City Pub. Ser. Frgt. Operation - Exempt. - Aban.*, 7 I.C.C.2d 216, 225-26 (1990) (issues of real property rights are within exclusive jurisdiction of the State); *Modern Handcraft, Inc. – Abandonment in Jackson County, Mo.*, 363 I.C.C. 969, 972 (1981).

b. The STB has No Jurisdiction Over and Exercises No Oversight or Jurisdiction Over Property That Formerly Was A Railroad Line or Its Future Use.

In *Wisconsin Cent. Ltd.* v. *Surface Transp. Bd.*, 112 F.3d 881 (7th Cir. 1997), the U. S. Court of Appeals for the Seventh Circuit stated at 887-8:

> There is no dispute that when WCL acquired the Mellen Bessemer Line from the Soo, the Line was no longer within the Commission's jurisdiction. The Soo had already obtained the Commission's permission to abandon the Line and had consummated that authority by discontinuing service. At that juncture, then, the Line was simply ordinary real property that WCL was free to transfer or dispose of without Commission approval.

A license or approval under NHPA clearly means the permission or right to engage in governmentally supervised activity (using Federal funds in whole or in part). The STB does not supervise any activity of the railroad that results from the grant of abandonment authority or exemption from regulation that might lead to a rail line abandonment.

G. STB Authorization or Exemption of Railroad Abandonments Is Not a Federal Undertaking Under the NHPA Based Either On the Possibility That Another Federal Agency May Have Jurisdiction Over The Railroad's Post-Abandonment Activities or The Railroad's Possible Post-Abandonment Use of the Property.

a. If Another Federal Agency Has Jurisdiction Over Post-Abandonment Use of Former Railroad Lines, That Agency Should Determine The Extent to Which NHPA Applies to Its Processes and Act Accordingly.

The only way the Federal government could possibly have any input into the subsequent activity on property that previously constituted a line of railroad is if a Federal agency other than the STB has jurisdiction over that subsequent activity. In that case, that agency should determine if the Section 106 process is applicable to any Federal undertaking that it takes or licenses that it grants for a Federal undertaking with respect to the property. *See Macht* v. *Skinner*, 916 F.2d 13 (D.C. Cir. 1990).

b. NHPA Does Not Apply to State, Local or Private Actions.

As the plain language of NHPA shows and *Western Mohegan Tribe & Nation* v. *New York*, *supra*, and several other cases indicate, NHPA does not apply to State, local or private actions, but only to Federal undertakings by Federal agencies.

c. The Railroad's Possible Actions With Respect to Its Private Property After the STB's Termination of Jurisdiction Over It Cannot Be Used As a Basis for the Application of the Section 106 Process In An Abandonment Proceeding.

Not only does NHPA remain merely a procedural, and not a substantive statute, (as several cases, including several already cited, recognized), its scope is limited. *See Concerned Citizens Alliance, Inc.* v. *Slater*, 176 F.3d 686 (D.C. Cir. 1999); *Waterford Citizens' Ass'n* v. *Reilly*, 970 F.2d 1287, 1290 (4th Cir. 1992); *Vieux Carre Property*

Owners v. *Brown*, 948 F.2d 1436, 1447 (5th Cir. 1991). The words of the U. S. Court of Appeals for the D. C. Circuit in *Lee* v. *Thornburgh*, 877 F.2d 1053, 1058 (D.C. Cir. 1989) are as applicable to NHPA after the 1992 amendments as they were before them:

> The National Historic Preservation Act is a narrow statute. Its main thrust is to encourage preservation of historic sites and buildings rather than to mandate it. It leaves not only Congress free but also the states, opting for the carrot, in the form of grants, rather than the stick. Federal agencies, in contrast, are commanded to value preservation, and are subject to certain requirements -- but only in relation to projects or programs they initiate or control through funding or approvals. It is their own nest Congress has asked the agencies not to foul.

Neither the STB's abandonment proceeding nor the railroad's private actions with respect to its property after it receives STB authority or an exemption from regulation that would permit an abandonment of a line of railroad is subject to the Section 106 process. The railroad's action with regard to private property over which the STB has no remaining jurisdiction, nor has not already licensed, is not licensed by the STB nor does the STB take part in such post-abandonment activities either financially or through regulation or oversight. Thus, neither the possible private actions subsequent to consummation of a rail line abandonment, nor the STB's abandonment proceeding "but for" which, but not as a direct consequence of, the post-abandonment activities occur can be considered a Federal undertaking to which the Section 106 process must be applied.

H. The Objectives of and the Public Interest Under the ICCTA Require That Application of the Section 106 Process to STB Railroad Abandonment Proceedings Be Ended.

a. The Section 106 Process is Being Used To Impose Conditions and Costs on Railroads With Respect to Projects or Activities on Private Property After STB Jurisdiction Over the Property Has Ended And When The Funds Spent Should Be Used in Projects That Will Serve the Shipping Public.

Increasingly expensive conditions are being sought, and in a some cases have been imposed, on railroads to "mitigate" supposed or possible adverse effects on historic and allegedly historic railroad properties that are the subject of STB rail line abandonment application or exemption proceedings. These properties most often consist of an increasingly repetitive number of similar railroad bridges. While the submission of all papers that the railroad has concerning a property and the submission of photographs by experienced railroad personnel familiar with the track structures should be sufficient to mitigate the effects of the possible alteration of these structures, some historic preservation officers and private groups now insist that this not enough even to identify the structure, much less to mitigate any potential effects of the railroad's post-abandonment actions with respect to it. Instead, they may desire expensive professional documentation, sometimes even studies, of railroad structures, and now here and in a few other cases, of an entire line.

These requirements clearly are unreasonable and unnecessary, especially in view of the wide variety of structures that have already been photographed and documented and because the purpose and effect of the delay does not contribute to an outcome that is much different than if the railroad papers and photographs were

accepted as sufficient mitigation from the beginning. For its part, NSR has in the past, and would be willing to continue, to turn over copies of photographs and documents or copies of documents concerning structures to be abandoned to historic preservation officers or institutions where they might be preserved as a matter of public interest before consummating an abandonment even without being legally required to do so as long as additional delays and costs were not being imposed.

The additional costs and delays caused by historic preservation processes and mitigation conditions simply make it harder for the railroads to find money to maintain their plant and equipment and to achieve revenue adequacy.

b. The Section 106 Process Causes Unwarranted Delay In The Effective Date of STB Decisions.

Numerous examples can be gleaned from the Board's web site of cases that have been delayed for considerable periods of time, often several years, so that the historic preservation process can be completed. These delays cause the railroads to suffer holding costs, including continued payment of property taxes, costs inherent in the inability to redeploy assets and possibly costs of additional "mitigation" conditions. The Board recognized the nature of some of these costs of delay in STB Docket No. AB-406 (Sub-No. 6X), *Central Kansas Railway, Limited Liability Company – Abandonment Exemption – In Marion and McPherson Counties, KS*, served May 8, 2001 sheet 18, where the Board stated: "While a railroad that has been authorized to abandon service is negotiating a trail use arrangement, it remains liable for management, torts, and payment of taxes. See *Idaho Northern* at 8-10. Thus, it would

be anomalous to assume that a railroad would prolong its exposure to these substantial liabilities if the railroad's actual intent is to abandon."

No other factor causes such delay in the conclusion of railroad abandonment proceedings as application of the Section 106 process. This is especially disturbing because seldom is anything meaningful accomplished by the delay.

c. The Section 106 Process Has Been, and Is, Subject to Abuse.

While there may be other cases in which the Section 106 process has been blatantly abused in order to achieve objectives for which it was not intended, and which could not be achieved under the ICCTA or another law, this case itself is an egregious example of such abuse, principally involving an effort to force donation of a railroad's private property to a private group. Not only that, the Court of Appeals decision in this very case has emboldened a trail group in another long-running abandonment proceeding concerning a valuable railroad property to attempt the same type of confiscation of private property under the guise of an historic effects mitigation condition. The proceeding had otherwise been subject to controversy and delay, as might be expected since it was an adverse abandonment proceeding, but it had been finally settled by all the principal parties with a stake in the matter, including the railroads and the adjoining landowners and government interests, and the settlement presented to the Board for approval when the trails group jumped into the matter.

On August 14, 2002, Chelsea Property Owners filed a motion requesting that an order be issued finding that a settlement agreement CPO negotiated with involved railroad and government interests, including The City of New York, New York City

Economic Development Corporation, New York Convention Center Development Corporation, Metropolitan Transportation Authority, and Triborough Bridge and Tunnel Authority satisfies the indemnity condition that would permit abandonment of the West 30th Street Secondary in New York City after 10 years of litigation and negotiation. On August 16, 2002, the Friends of the High Line, Inc. (Friends), a trail group, filed a petition to reopen, claiming that the Highline is an historic structure that must be preserved and that its demolition would have far different environmental effects than envisioned. Friends convinced the City of New York, or one of its offices, to reassess its position and the City asked for an extension of time to December 17, 2002 to respond to the CPO petition and the Friends petition. There is certainly reason to be concerned that this four-month delay is just the beginning of extra costs and delays if the Board unnecessarily continues to apply the Section 106 process to railroad abandonment proceedings.

The Board needs to cut off this growing stream of manipulation of the Board's process and abuses before it becomes a torrent.

d. Application of the Section 106 Process To STB Railroad Abandonment Proceedings Prevents the Board From Administering the ICCTA, Its Governing Statute, In Accordance With Its Purpose and Congressional Policy.

The Board continues to cite *Colorado* v. *United States*, 271 U.S. 153 (1926) to explain its role and authority in abandonment proceedings because it continues to be pertinent to this day. For example, Justice Brandeis stated at 271 U.S. at 162-3:

> The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under

> paragraphs 18-20. The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its Federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.

While Justice Brandeis was talking about the attempted regulation of railroad line abandonments by the States, he could equally have applied the same principles under the successor statute, ICCTA, to the unnecessary application of the Section 106 process to railroad abandonment proceedings that is becoming tantamount to regulation of abandonments and the increasingly costly and unreasonable requirements being sought under that process.

In *Hayfield Northern Railroad Co., Inc.* v. *Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984), the Supreme Court noted the Congressional policy embodied in two revisions of the Interstate Commerce Act:

> To alleviate the costly delays imposed upon railroads by protracted proceedings before the Commission, the 4-R Act provided a schedule to govern the abandonment process. See 49 U. S. C. §§ 1a(3), (4) (1976 ed.). At the same time, to afford opponents of an abandonment an opportunity to maintain rail service, the 4-R Act allowed abandonment to be delayed for up to six months if a financially responsible person offered to subsidize or purchase the line. §§ 1a(6)(a). It soon became clear, however, that further reforms would be required

> in order adequately to address both the need of railroads for an even more abbreviated method of abandonment and the need of shippers and communities to avoid the dislocations caused by abandonment. As a consequence, Congress further amended the Interstate Commerce Act by enacting the Staggers Rail Act of 1980, Pub. L. 96-448, §§ 402, 94 Stat. 1941-1945, codified at 49 U. S. C. §§ 10903-10906.

467 U.S. at 629. *See also id.* at 630 n.8, quoting S. Rep. No. 96-470, pp. 39-41 (1979) ("'The abandonment provisions of this bill are designed to accomplish two major objectives: significantly reducing the time spent processing [abandonment] cases at the Commission and improving the process by which abandoned lines can be subsidized'"); and H. R. Conf. Rep. No. 96-1430, p. 125 (1980) ("§ 10905 as amended will 'assist shippers who are sincerely interested in improving rail service, while at the same time protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process'").

In *Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903*, 1 STB 894 (served December 24, 1996), the Board noted the policy as to the latest statutory revisions:

> We continue to view the ICCTA as reform legislation and thus our effort has been to reform and streamline the existing rules and process. As we stated in the NPR, our goal has been to revise part 1152 to meet the letter and spirit of the ICCTA and to update the regulations to improve notice to the public and ensure ample opportunity for full public participation early in our proceedings. We continue to believe that this will result in a timely, expeditious resolution of abandonment cases and allow all interested parties to participate fully.

As Steven R. Wild noted in *History of Railroad Abandonments*, 23 Transp. L.J. 1 (Summer 1995), page 10:

> A 1988 GAO study of twenty-one industries ranked railroads dead last in return on equity. Many commentators attribute at least part of the problem on the remaining administrative impediments to abandonments. There is more than just railroad profit at stake in the concern for efficient railroads. Rectifying inefficiencies in the nation's transport system saves the nation many times over in terms of business logistics costs. Better, cheaper, and faster rail service due to deregulation has already saved the nation some five billion dollars over the last decade.

Yet the goals and purposes of all these amendments to the Act and statements of purpose and policy by Congress, the Courts and the Board, are, and are threatened to be increasingly, thwarted by the abuses and delays caused by the unnecessary application of the Section 106 process to STB rail line abandonment proceedings.

e. Even if the Section 106 Process Were Voluntarily Applied to Railroad Abandonment Proceedings, Little Is Accomplished or Will Be Accomplished Especially When Balanced Against Its Costs.

While trail groups and a few others are now becoming bolder in their demands under the NHPA, little is, nor can be, actually accomplished by the application of Section 106 to railroad abandonment proceedings. The Board cannot give in to the more extreme demands without confiscating railroad property, or the use of it, and failing to adhere to its mandate under the ICCTA to administer the act in order to allow railroads to operate efficiently and cost-effectively in the interests of the shipping public and to earn an adequate rate of return on their investment. Since the Section 106 process often comes down to quibbling over what is required to mitigate the adverse effects, or possible adverse effects, of railroad abandonments on an endless series of increasingly similar railroad bridges, which is usually documentation at most, and the process is now being used to demand even more, the small public interest in applying

the Section 106 process voluntarily is far outweighed by its costs. At most, the Board should merely work with the railroads on voluntary preservation of historical records in their possession as to lines to be abandoned and structures that are part of those lines by the contribution of those records to SHPOs or their designees.

I. The Board Should Discontinue the Section 106 Process in This Proceeding and All Other Rail Line Abandonment Proceedings Before the Board And Not Apply It to Future Railroad Abandonment Exemption or Application Proceedings.

The ICC, the Board and the courts have repeatedly recognized the Congressional policy under the Interstate Commerce Act and the ICCTA to expedite abandonment decisions, to streamline the abandonment process and to permit railroads to redeploy at least the constitutional minimum value of their own, private assets in continuing service to their private, though regulated enterprise, that serves the broad shipping public and the entire public interest in a sound transportation system. That policy has been restated, the governing statute has been amended and strengthened and the Board's regulations have been amended, all to no avail in many cases because of the delays and abuses caused by application of the Section 106 process to railroad abandonment proceedings. The law does not require this continuing frustration of the Board's statutory mandate. If the ICC or the Board thought that the minimal public interest in applying the historic preservation process considerations voluntarily in railroad abandonment proceedings could be achieved with little cost or delay or frustration in implementing the Congressional directives under the ICCTA, the history of ICC and STB proceedings has shown this balancing to be unattainable. The Board

should grant railroad line abandonment authority, or apply the exemption criteria, in a manner that would permit rail line abandonments to proceed as Congress has so often said it wants them to do, without going through the costs and delays caused by this unnecessary process.

The Board should use this case to recognize that the Section 106 process is not applicable to railroad abandonment proceedings, which neither are a Federal undertaking nor authorize any Federal undertaking as defined by the NHPA. Thus, the Section 106 process should not be applied to STB abandonment proceedings. The Board has no jurisdiction or oversight over post-abandonment use of railroad property, and should not impose costly conditions that would frustrate the Congressional purpose of redeploying these purely private assets, entirely with private funds, to other uses.

Therefore, the Board should discontinue the Section 106 process in this proceeding and all other rail line abandonment proceedings before the Board. The Board should not apply the Section 106 process to future railroad abandonment exemption or application proceedings, and NSR requests that the Board act accordingly.

VII. Issues Upon Which the Board Has Requested Comment

The Board's October 24, 2002 notice requested comments on five issues:

1. Identification of additional consulting parties;
2. Any need for further assessment of adverse effects on the line;
3. Appropriate mitigation measures (including comments on the measures specified in the earlier MOA and suggestions for additional or alternative measures, as well

as information regarding the current condition of the rail line);

4. Methods or outlets for publicizing a proposed MOA; and

5. Any other pertinent issues relevant to this proceeding.

We will comment on each point in turn to the extent we are able to add anything to the work already done by Conrail and the Board in this matter. However, we have already addressed the determinative jurisdictional issue which comes first, and which perhaps is the key issue in Point 5.

A. Identification of additional consulting parties.

SEA consulted with the Advisory Council on Historic Preservation (ACHP) and the Pennsylvania State Historic Preservation Officer (SHPO) while preparing the October 24, 2002 Notice to the Parties (Notice), and provided them with the opportunity to review and comment on the Notice prior to issuance. SEA also worked extensively with the SHPO and other parties at earlier stages of this proceeding. Conrail contributed all the information it had about the property, including the bridges. Lancaster County commented on the historic significance of the Line.

Other interested parties, including FAST, have had the opportunity to comment on this matter. They know about the reopened proceeding and now have further opportunity to comment. The case has received wide notoriety, especially in the counties in which the line is located. It is difficult to imagine how anyone with any interest in this line or anything to contribute to this process would not have done so, or would be able to do so in response to the Board's Notice, which was published in the Federal Register and released on the Board's web site and through the Board's regular

distribution processes.

B. Any need for further assessment of adverse effects on the line.

The potential adverse effects of the abandonment of this line have received more scrutiny and assessment than has been given to any other line for which Board abandonment authority or exemption has been sought.[5] There is no need to spend further time or resources on assessing what will become of the property as a direct result of the abandonment proceeding. Plans for sale and disposal of the property are in the record. The bridges that are scheduled to be removed pursuant to the order of the Pennsylvania are known. Consideration of anything that might, but will not necessarily, happen to the property after the abandonment is consummated would not only be speculation and a waste of time, but it would not be within the Board's jurisdiction to affect.

C. Appropriate mitigation measures.

The Board's October 24, 2002 notice suggested that comments on this issue include comments on the measures specified in the earlier MOA and suggestions for additional or alternative measures, as well as information regarding the current condition of the rail line.

The Board had previously provided for, and Conrail had not only agreed to provide, but has provided, mitigation measures far in excess of the minimum that would

---

[5]NSR acknowledges that the attention given, or perhaps that may be given, to the case of the West 30th Street Secondary Track (High Line) in New York, NY may be or become an exception to this statement.

be satisfactory under the law and regulations. It is difficult to imagine what more the Board, or NSR on behalf of PRR as successor to Conrail, could reasonably provide. Since the arguably truly historic bridges have already been photographed and documented and Conrail has not only provided everything that it has concerning this line but NSR paid $15,437 to have an exhibit on the line set up in the Pennsylvania Railroad Museum on June 2, 2001, further measures are unnecessary, and to the extent they would impose any significant additional costs or obligations on the railroad would be unreasonable, arbitrary and capricious. However, NSR would agree that some additional regular photographs might be taken and explained in the event all the structures on the line have not been photographed, although we believe they have been. NSR also believes that Conrail's settlement agreement with the townships must be considered as a mitigation measure. Reference was made to it in the draft MOA.

a. Mitigation Comments are Offered Without Waiving Jurisdictional Argument Concerning Legal Inapplicability of Section 106 Process.

NSR offers the following comments on mitigation measures in the interest of trying to end this proceeding quickly. In no way does this waive or express any lack of commitment in NSR's jurisdictional argument concerning the inapplicability of the Section 106 procedure to this proceeding.

b. NHPA Neither Imposes Substantive Requirements Nor Requires Particular Measures or Actions in Mitigation of Presumed Adverse Effects on Eligible or Arguably Eligible Historic Properties.

NHPA is a procedural statute. See *Concerned Citizens Alliance, Inc.* v. *Slater*,

176 F.3d 686 (D.C. Cir. 1999); *Waterford Citizens' Ass'n* v. *Reilly*, 970 F.2d 1287, 1290 (4th Cir. 1992); *Vieux Carre Property Owners* v. *Brown*, 948 F.2d 1436, 1447 (5th Cir. 1991). It requires the agency (not a private party) that is engaged in or approving a Federal undertaking to consider mitigation of any adverse effects of that Federal undertaking on historic properties. It is clear that no particular substantive result is required and that no project need be prevented because of NHPA. In *Concerned Citizens Alliance, Inc.* v. *Slater*, 176 F.3d 686 (D.C. Cir. 1999) the U. S. Court of Appeals for the D.C. Circuit recognized the need for an agency to take a serious look at the ACHP's comments, but said at 173 F.3d at 695: "Though the text of Section 106 does not specify what the Advisory Council's "opportunity to comment" on a project entails, the Advisory Council's regulations and the legislative history demonstrate that the total response required of the agency is not great."

It is thus apparent that any mitigation measures applied pursuant to NHPA must not be so costly or onerous that they negate the benefits of the project or undermine other statutory objectives.

c. The Board Has No Jurisdiction to Require Any Post-Abandonment Disposition or Use of a Former Line of Railroad Under the ICCTA, the National Trails System Act or the National Historic Preservation Act.

It is well settled that the STB has no jurisdiction to require any forced disposition of railroad property in an abandonment proceeding, except pursuant to an Offer of Financial Assistance, which is not present in this case. The Board's lack of jurisdiction over former railroad lines as to which the railroad has consummated an abandonment

based on STB authority or exemption from regulation is discussed at considerable length in Part V and need not be repeated here. However, there are additional ICC and STB decisions that hold that an abandonment cannot be conditioned on a public use or conveyance to a third party outside the OFA procedures.

In ICC Ex Parte Docket No. 274 (Sub-No. 13), *Rail Abandonments -- Use of Rights-of-Way As Trails -- Supplemental Trails Act Procedures*, served May 26, 1989, the ICC recognized at page 11 of the slip opinion that the Commission had no authority to force a railroad to convey a rail line that was the subject of an abandonment proceeding to any public or private group for the purpose of turning it into a trail.

The NHPA is a purely procedural act, and requires no substantive result at all. Confiscating railroad property either directly or through onerous conditions in order that it be preserved for historic preservation purposes, particularly so that it may be donated, conveyed or otherwise turned over to a trail group for their use as a trail with the ostensible purpose that its historic character be preserved, is not a proper mitigation measure. Moreover, there would be no way for the Board even to monitor whether the purpose was being accomplished.

d. Historic Effects Mitigation Measures Must be Reasonable and Not Arbitrary and Capricious.

In *Concerned Citizens Alliance, Inc.* v. *Slater*, 176 F.3d 686 (D.C. Cir. 1999), the U. S. Court of Appeals stated with agreement at 695:

> The Waterford court concluded, "There is thus no suggestion in either the statute or the legislative history that section 106 was intended to impose upon Federal agencies anything more than a duty to keep the Advisory Council informed of the effect of Federal undertakings and to allow it to make suggestions to mitigate

adverse impacts on the historic sites under its protection."

It is obvious that historic effects mitigation measures, which are not substantively required, must be reasonable and not arbitrary and capricious. For the railroads, a private business in a private undertaking using private funds, to subsidize trail groups in the guise of historic preservation proponents, or historic preservation objectives at all is unreasonable, arbitrary and capricious and contrary to the policies of the ICCTA.

The ICC recognized that it was improper for unprofitable railroad operations to be subsidized by profitable ones in ICC Finance Docket No. 31447, *Burlington Northern Railroad Company -- Sale, Purchase, and Operation Exemption -- Missouri Pacific Railroad Company*, December 1, 1989, at page 5 where the Commission stated:

> In opposing this transaction, Simmons seeks a cross subsidy of the unprofitable rail operation between Hoyleton and Centralia with the greater volume of traffic moving to and from Centralia. In so doing, he would also deny to these rail carriers the free exercise of their managerial discretion to rationalize their operations. Such results contravene central policies of the Staggers Rail Act of 1980 and the NTP. The Staggers Act changes to the NTP reflect an intent to accord carriers reasonable discretion in their efforts to rationalize operations (49 U.S.C. 10101a (1), (2), (4), (5), (7), and (10)). Efficiencies that inure to the benefit of shippers should be encouraged.

It is obvious that subsidization by the railroad of trail groups or historic preservation interests is even more inimical to the purposes of ICCTA and should not be required.

e. Previously Agreed Upon and Now Largely Completed Historic Effects Mitigation Measures Constitute More Than Sufficient and Reasonable Mitigation of Any Adverse Effect of the Abandonment of the Enola Branch on Historic Properties.

1. Historic Effects Mitigation Measures That Already Have Been Agreed Upon and Undertaken In This Case.

The State level recordation of the five bridges that are slated to be removed under the Pennsylvania PUC's order have been completed to the SHPO's satisfaction. NSR has paid the $15,437.00 to the Pennsylvania Railroad Museum to fund a video and exhibit as to this line. Conrail's settlement agreement with the townships will result in conveyance of most of the remaining property to the townships, and payments totaling over $1.3 million to fund maintenance and preservation of some of the property. The demolitions that Conrail is required to perform under the PUC decision were estimated to cost about $500,000 several years ago.

2. NSR Disagrees With the Eligibility Determination With Respect to the Entire Enola Branch.

NSR disagrees with the eligibility determination with respect to the entire Enola Branch. Moreover, a "linear resource" surely describes someone's characterization of an existing stretch of property without regard to its historic nature. The historic designation determination was apparently made before NSR took over the case and we are not sure whether Conrail participated in that proceeding. In any event, as far as NSR is concerned, there is no such thing as a historic "linear resource." Furthermore, the Enola Branch was a secondary main line of limited importance and was no more an engineering feat, having been built in the early 1900s, than other lines such as Norfolk

and Western's line between Norfolk, VA and Petersburg, VA that was built before the Civil War and is still in active use. Most railroad lines are more than 50 years old and contributed in some degree to the local economies at some point in time or they would have been abandoned by now. That does not make them especially historic in our view. Even if this line might technically fit within the rather loose criteria for determining a property that is over 50 years old to be eligible for listing in the National Register of Historic Places, however, it is difficult to conclude that this line was at all significant. The nearby PRR main line obviously carried, and continues to carry, much more traffic and there are many other lines with similar engineering characteristics that remain available for observation or study.

Just because FAST wants to manipulate the historic preservation process in an attempt to confiscate this property for its own use does not make this line a resource of national significance as they have characterized it. In its current state, and given its past use as among a myriad of branch lines and secondary main lines in the national railroad system, it is hardly a resource at all, much less a historic one.

3. Previous Historic Effects Mitigation Measures Are Sufficient Even If The Entire Enola Line, Rather than Just Certain Structures on the Line, Is Considered Eligible for Section 106 Process Treatment.

In view of the funding of the video and exhibit on the line to be displayed at a the Pennsylvania Railroad museum by NSR on June 2, 2001 in the amount of $15,437.00, the documentation of historic or arguably historic bridges that are slated to be torn down, and the terms of the Conrail settlement agreement that will convey parts of the

line and remaining structures to the townships, together with a payment of approximately $1.3 million, sufficient mitigation measures have already been taken concerning the adverse effects of the abandonment of the line itself as well as structures on the line.

f. Conrail's Settlement Agreement With the Townships Should Be Considered an Historic Effects Mitigation Measure.

1. Terms of the Conrail-Townships Settlement Agreement.

The Board has the settlement agreement between Conrail and the townships which will result in the preservation of quite a few of the structures on the line as well as stretches of the line. The agreement was referred to in the MOA and described in the background statement to accompany it. We will not repeat the terms here, assuming that the Board is well aware of them. However, we will provide an additional statement on the agreement if the Board requires it.

2. Conrail-Townships Settlement Agreement Should Be Considered A Historic Effects Mitigation Measure.

Inasmuch as the townships intend to, or will have the option to, preserve some of the structures and the parts of the line that pass through them, and are in the best position to judge whether these local properties should be preserved in the public interest, or in whether they should be used in any particular manner to serve the public, the settlement agreement, and railroad payments to the townships that will accompany conveyance of the property, should be considered mitigation measures. No additional covenants or conditions should be placed on the properties, however, because the townships are in the best position to determine how to deal with them in the public

interest. The reference to this agreement in the draft MOA was apparently made to recognize that the agreement will result in substantial additional preservation of this property.

3. The Board Should Take No Action That Would Impair the Settlement Agreement Which Deals With Post-Abandonment Use of the Property.

The townships are better equipped to maintain any structures that they will take ownership of that they believe are historic than any private group. There is no need for the Board to take any action that would impair the agreement under which the property will be transferred.

g. Requirement of Additional Expenditures for or Conditions as Historic Effects Mitigation Measures Defeat the Purpose of Authorizing A Railroad Abandonment Under the ICCTA, Would Be Unreasonable, Arbitrary and Capricious, Would Be Tantamount to Regulation of the Property, and Would Be Confiscatory.

Additional expenditures for this case which has already cost the railroad a great deal in previous actions that were deemed acceptable by the SHPO until FAST agitated for more would be unreasonable, and indeed would likely become arbitrary and capricious. Conrail and NSR have already done more than enough to mitigate any adverse effects of the abandonment on historic properties. They have already had to bear unnecessary holding costs and legal fees due to the appeal of the Board's previous decision and the necessity of making reports to, and asking for stays of the bridge removal order from, the Pennsylvania PUC. There is little more that the railroad can reasonably do than already has been done, or that would serve any purpose.

The constitutional minimum value that the Board is required to set for the acquisition of a rail line to be abandoned by another party under the OFA procedures is the greater of the net liquidation value or the going concern value. STB Finance Docket No. 32479, *Caddo Antoine And Little Missouri Railroad Company-Feeder Line Acquisition-Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR*, served Aug. 12, 1999; 49 U.S.C. 10907(b). It would be anomalous as well as unreasonable, arbitrary and capricious if, due to holding costs and historic effects mitigation conditions applied to purely private property engaged in purely private business with its own funds, the amount of its own property that the railroad was able to retrieve from lines to be abandoned was below the constitutional minimum value prescribed by ICCTA in order to keep property in railroad service, an aspect of the Board's statutory mandate. Yet, it would be more than surprising if the railroad were to achieve this minimal return in this case. The Board should not worsen the situation in this case and in no case should apply conditions that would not permit the railroad to retrieve the constitutional minimum value for its property, especially in view of the fact that the funds are private funds and the activity for which the conditions are sought is not a Federal undertaking under NHPA.

h. NSR Will Complete Any Uncompleted Commitments; Will Take Additional Photographs Voluntarily if Required in Public Interest to End Proceeding; Will Not Agree to Additional Expenditures on Mitigation Measures.

NSR, of course, will arrange for compliance with any uncompleted Conrail commitments with regard to the settlement agreement, bridge removal, or production of

anything promised to the SHPO or the Pennsylvania Railroad Museum. In fact, NSR has already voluntarily paid the museum the agreed upon amount of $15,437.00 to fund an exhibit or video on the history of this line. NSR is aware that all the historic bridges that will be taken down as a result of the abandonment have been documented and believes that all bridges of any significance have been photographed and the photographs submitted to the SHPO or museum or both. NSR is willing to give any records pertaining to the line or structures on the line to the townships that will take ownership of them or to the SHPO or museum. If not all the structures have been photographed, NSR will voluntarily agree to have its track engineer photograph them and provide pertinent information to accompany the photographs. We believe this has been done, but if not, it is something we can do at relatively minimal cost to end this matter. However, we will not agree to costly documentation of the remaining ordinary or repetitive structures, much less to some extraordinary condition that would negate the settlement agreement, cause NSR considerable additional cost and expense or require any continuing obligation with respect to the property.

D. Methods or outlets for publicizing a proposed MOA.

While service of a proposed MOA on all the persons on the Board's service list, release of the MOA in the Board's daily releases, including publication in the Federal Register and making the MOA available on the Board's web site, are clearly sufficient methods or outlets for publicizing a proposed MOA, a press release may also be appropriate. Although not necessary, the Board may wish to go even further and send a press release specifically to the local papers in Chester and Lancaster Counties via

fax, e-mail or mail. The press release could include a copy of the MOA or reference to the Board's web site where it could be found. Given the widespread local interest and past coverage of the matter in the local papers, those papers should give additional publicity to the MOA.

E. Any other pertinent issues relevant to this proceeding.

a. The Applicability of Section 106 to Railroad Abandonment Proceedings.

While the U. S. Court of Appeals for the Third Circuit remanded the Board's decision served August 16, 1999 in this matter for further review under the Section 106 process of the National Historic Preservation Act due in large part to the Court's misunderstanding and misinterpretation of the ICC's and Board's prior actions in handling this matter and of the material facts of the case, the key question that has not previously been presented is whether the Section 106 process should be applicable to the STB proceeding initiated by a notice of exemption. This crucial additional issue, the applicability of Section 106 in these proceedings at all, is addressed earlier in these Comments.

b. The Public Interest In This Case.

The Board and the parties are doing considerable unnecessary work and suffering too much delay in concluding this matter this unwarranted and totally unnecessary reprise of the previous Section 106 handling of the case. Those burdens and the attendant delay in concluding the matter and removing bridges that are considered hazardous by the State and the public, as well as conveying much of the

remaining property to local governments under the settlement between Conrail and those townships, are not legally required and are contrary to the public interest.

The public interest in this case, as in all railroad abandonment cases, is in reaching a speedy conclusion, at least from this stage, with the least depletion of railroad assets used in serving its customers. It is in not burdening the railroad with additional "mitigation" measures in addition to those already performed that would be costly, unreasonable, arbitrary and capricious under the circumstances of this case, and probably delay its ultimate conclusion.

The public interest lies in taking down bridges now deemed to be hazards and in conveying the remaining property to the townships. It is in permitting the railroad to stop the revenue drain caused by this proceeding and the inability to dispose of the property. It is in permitting the Board to govern proceedings under the mandates of ICCTA, its governing statute, without limitless and unnecessary delays in carrying out the statutory purposes. Those purposes include the preservation and promotion of a healthy railroad system to serve the broad public interest in an adequate national transportation system. Those purposes are served by allowing prompt abandonment of rail lines with minimal further costs in order to eliminate the financial losses to a railroad caused by the unnecessary, indeed the prolonged, retention of uneconomic property or by the tying up of potentially productive assets no longer useful in railroad service where located but useful to the overall enterprise if redeployed. Such drains on limited railroad resources not only hurt the railroad, but are detrimental to the shipping public, which has to pay for the extra costs in some way through higher rates or less than optimum plant and

equipment. Such is the public interest in this case, as in every abandonment case.

Delays and accompanying demands and detriments that thwart the statutory, public interest goals of the Board's governing statute - and waste the Board's limited resources - effectively amount to abuse of the historic preservation review process. This is especially egregious when it occurs through an effort to achieve narrow, private advantages neither required by law or regulation nor achievable through negotiation. This is exactly FAST's purpose in this case, but it is contrary to the public interest and the public good in removing unnecessary railroad structures that are no longer required for railroad service.

The Board's need and ability to prevent unwarranted delay and conclude these proceedings in a timely manner are especially important in a case such as this one where all reasonable measures have been taken by the railroad and by the Board to abide by proper procedures and to provide satisfactory handling of historic preservation issues. Congress surely did not give the Board time frames within which to decide abandonment proceedings, only to see those proceedings prolonged for years by side considerations that are not even required of the Board by other law.

The townships, public officials, the Pennsylvania PUC, and private citizens, in addition to the railroad, have all expressed the public interest considerations in this case. It lies with completing the case with no more cost and delay in accordance with the measures already completed or previously agreed upon. We should have to hear no more stories like that expressed in the Attachment 3.

VIII. Conclusion.

This abandonment exemption proceeding was initiated by notice from Conrail in 1989. Conrail worked with FAST, the trail group that continues to prolong this proceeding on supposed historic preservation grounds, on the possibility of conveying the line to them as a trail for several years without success. FAST, a small organization with no assets, simply wants the property donated to them, and more. This has little if anything to do with historic preservation. Conrail then reached an agreement with the townships to convey most of the real property and bridges to the townships, while being prepared to give a total of $1.3 million to them maintain some of the structures. Conrail provided all the historic preservation documentation and information in its possession, plus documentation of bridges that the Pennsylvania PUC wants torn down as safety hazards, and thereby apparently satisfying the SHPO, until FAST agitated the ACHP to participate in the proceeding and convince the SHPO not to execute the MOA that would have ended this matter. Then Norfolk Southern Railway Company became the lessee and operator of the property of Conrail's PRR subsidiary, on June 1, 1999, and inherited this case because the line was in territory allocated to PRR mostly by default, since it was a discontinued line. NSR has already kept Conrail's commitment to donate $15,437.00 to the Pennsylvania Railroad Museum to fund an exhibit on the Enola Branch. NSR intends that Conrail's commitments with regard to the settlement agreement with the townships and the removal of bridges be kept by continuing Conrail or NSR as operator of PRR. If there are any other outstanding, written Conrail commitments that need to be fulfilled, or any other items that PRR or NSR possess or

can provide to the SHPO or the Pennsylvania Railroad Museum without significant additional cost or any continuing obligations, they will do so. In the absence of an order by the Board that would prevent this, NSR cannot see how it can proceed differently. On the other hand it does not see how it can reasonably be expected to do anything more.

NSR has worked with trail groups, or local governments interested in maintaining a trail on a railroad right-of-way, in the past when mutually beneficial to do so and not contrary to other overriding public interests or alternative uses of the property. We will continue to do so under similar circumstances voluntarily in the future. Yet, in view of this and similar cases, and the possibility that a disappointed trail group will use the delay caused by good faith negotiations to prolong and abuse the process by raising historic preservation issues because of the passage at time, we will be forced to take that possibility into account unless our motion herein to discontinue the Section 106 process in STB rail line abandonment proceedings is sustained.

We do not believe that the Board would, even if it could, nor will they in this case force the railroad to donate property to trail groups or to suffer continued or significant additional costs in order to "mitigate" alleged adverse effects on actual or supposed historic properties, especially in view of all that has been done already. Thus, while the Board can fulfill the Court's mandate of taking a further look at this and considering the ACHP comments, and perhaps may take into account the terms of the settlement agreement if they have not already done so, we do not believe the final outcome should be much different than it would have been had the MOA been executed over four years

ago.

In future cases, NSR will continue to provide information in its possession on bridges or other components of rail lines voluntarily. However, NSR requests that the Board recognize that compliance with the Section 106 process is not required by the NHPA in railroad abandonment proceedings and discontinue the process in this and other railroad abandonment proceedings. This may be the only way to stem the rising tide of abuse, waste, cost and delay in these situations.

It is clear that "an agency need not satisfy the § 106 process at all . . . unless it is engaged in an undertaking." *McMillan Park Committee* v. *National Capital Planning Comm'n*, 968 F.2d 1283, 1289 (D.C. Cir. 1992). STB approval or exemption from regulation of railroad abandonments is not an undertaking for which the Board needs to satisfy the Section 106 process. It is time for the Board to stop doing so.

The Section 106 process not only is not legally required in STB abandonment proceedings, most of which are exemption proceedings, but it is producing results of no apparent public benefit that are contrary to the policies and provisions of the ICCTA. In this case, at least one young person might still be alive were it not for the unnecessary continuation of this proceeding by a small group zealously pursuing their private goals through abuse of the Section 106 process. It need not continue to happen.

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY,
Lessee and Operator of Pennsylvania Lines LLC,
Successor to Consolidated Rail Corporation

By James R. Paschall / SMZ

James R. Paschall
General Attorney
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2759

December 9, 2002

APR 30 1998

Commonwealth of Pennsylvania
Pennsylvania Historical and Museum Commission
Bureau for Historic Preservation
Post Office Box 1026
Harrisburg, Pennsylvania 17108-1026

Attachment 1

April 27, 1998

David C. Eaton
Nauman, Smith, Shissler & Hall
P O Box 840
Harrisburg, PA 17108-0840

TO EXPEDITE REVIEW USE
BHP REFERENCE NUMBER

Re: ER 89-1632-042-FF
STB: Proposed Abandonment of the Conrail Enola Branch of the former Pennsylvania Low Grade Line, Chester and Lancaster Counties
Interpretative Display at Railroad Museum of Pennsylvania

Dear Mr. Eaton:

The Bureau for Historic Preservation (the State Historic Preservation Office) has reviewed the above named project in accordance with Section 106 of the National Historic Preservation Act of 1966, as amended in 1980 and 1992, and the regulations (36 CFR Part 800) of the Advisory Council on Historic Preservation. These requirements include consideration of the project's potential effect upon both historic and archaeological resources.

We are writing as a follow-up to your letter of April 7, 1998. As noted in our phone conversation, the interpretative display proposal supplied to our office meets our requirements.

If you need further information in this matter please consult Susan Zacher at (717) 783-9920.

Sincerely,

Kurt W. Carr, Chief
Division of Archaeology

cc: John J. Paylor, Esq., Conrail
C. Vaughn, Advisory Council on Historic Preservation
Joyce A. Nettke, P O Box 27, Strasburg, PA 17579
Randolph Harris, Historic Preservation Trust of Lancaster County
KWC/smz

JUN 25 1998

Attachment 2

Commonwealth of Pennsylvania
Pennsylvania Historical and Museum Commission
Bureau for Historic Preservation
Post Office Box 1026
Harrisburg, Pennsylvania 17108-1026

June 18, 1998

David C. Eaton
Nauman, Smith, Shissler & Hall
P O Box 840
Harrisburg, PA 17108-0840

TO EXPEDITE REVIEW USE
BHP REFERENCE NUMBER

Re: ER 89-1632-042-KK
STB: Proposed Abandonment of Consolidated Rail Corporation of a Portion of its Enola Branch in Lancaster and Chester Counties (Docket No. AB Sub-No. 1095X) and Docket A-00111016

Dear Mr. Eaton:

The Bureau for Historic Preservation (the State Historic Preservation Office) has reviewed the above named project in accordance with Section 106 of the National Historic Preservation Act of 1966, as amended in 1980 and 1992, and the regulations (36 CFR Part 800) of the Advisory Council on Historic Preservation. These requirements include consideration of the project's potential effect upon both historic and archaeological resources.

We are in receipt of the State Level Recordation for five of the bridges on the Enola Low Grade Line. This recordation is acceptable as part of the mitigation for this project.

If you need further information in this matter please consult Susan Zacher at (717) 783-9920.

Sincerely,

Kurt W. Carr, Chief
Division of Archaeology

cc: John C. Paylor, Conrail, P O Box 41416, Philadelphia PA 19101-1416
KWC/smz

A-14
NEW ERA SATURDAY, JULY 17, 1999

LETTERS

Atglen-Susquehanna bridges are dangerous: remove them

Editor, New Era:

There have been recent letters concerning the Atglen-Susquehanna rail-to-trail plan. I have never voted for Rep. John Barley or others who oppose the trail. Maybe I should. Their first responsibility is to the safety of the area in which they serve.

They turn their backs on "rails to trails" because of the inherent danger of these outdated railroad tunnels that "rails to trails" wishes to preserve.

I know this first-hand, for my 19-year-old daughter Katie had her life cut short at the Route 222 tunnel at Quarryville on May 9, a tunnel that was set for removal several years ago until "rails to trails" decided to tie its demolition up in the court system.

Now I know that the life of one 19-year-old, church-going, honor student at Millersville is not nearly as important as the "uniqueness" of a 100-year-old rail line that the railroad decided was needless. Maybe the next time it can be a school bus load of "sacrifices" that meets their demise to preserve hikers' needs.

There have been countless other incidents involving this and other tunnels where the train doesn't go anymore, just to save that hiking need.

If they feel the need to hike, they are welcome to hike from Quarryville through that tunnel to my home in New Providence so they can explain to Katie's 5-year-old brother why Katie and her white car don't come home and then they can explain it to my wife and me, too. A hiking trail at the cost of public safety? How tragically stupid.

Andrew Fullam
New Providence

B
NEW ERA
MONDAY,
MAY 10, 1999

Solanco driver 'critical' after Rt. 272 crash

by John M. Hosber III
New Era Staff Writer

A young New Providence woman suffered severe injuries early Sunday morning when her car struck the side of the railroad tunnel on Route 222, north of Quarryville, state police said.

Kathleen M. Fullam, 19, remains listed in critical condition today at Lancaser General Hospital.

Traveling north, the woman drove across the southbound lane and hit the west side of the stone tunnel at 2:45 a.m., Trooper Van Jackson said.

Fullam was wearing her seat belt, but sustained major injuries, the trooper said. Ambulance crews from Quarryville, Willow Street, and Lancaster responded. A helicopter flew the woman to the hospital.

At 3 a.m. Sunday, a vehicle driven by Jason Lloyd Kieffer crashed in the 5400 block of Old Philadelphia Pike, Salisbury Township, state police said.

Heading east, Kieffer's vehicle went off the north side of the highway, became airborne, rolled

More CRASH on B-2

Crash

Continued from B-1

over, and came to rest 127 feet from where it left the road, Trooper Derek Koch reported.

Kieffer, 20, Honey Brook, was flown to Brandywine Hospital in Chester County. He has been discharged, a hospital spokeswoman said.

Barbara Y. Wiley, 51, of 114 N. Water St., and Matthew J. Frederick, 27, of 1178 Elm Ave., were treated and released at Lancaster General Hospital following a Sunday evening accident at Wilson Drive and Columbia Avenue, city police said.

Wiley told Officer Thomas Gjurich she was heading east on Columbia Avenue and entered the intersection on a green light. Frederick, who was heading south on Wilson Drive, said the light was yellow when he entered the intersection., Gjurich said.

The cars collided at 6:40 p.m. Both vehicles required towing, police said.